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Department of Labour, Canada
HON. G. D. ROBERTSON — — MINISTER OF LABOUR

COMBINES INVESTIGATION ACT

INVESTIGATION INTO THE
**ELECTRICAL ESTIMATORS'
ASSOCIATION**

AN ALLEGED COMBINE OF ELECTRICAL
CONTRACTORS IN THE CITY
OF TORONTO

Report of Commissioner
October 4, 1930

OTTAWA: F. A. ACLAND, Printer to the King's Most Excellent Majesty, 1930

Price, 25 cents.

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COMMUNICATIONS SECTION

INTERIOR INTO THE

ELECTRICAL ESTIMATORS

ASSOCIATION



Report of Commissioner

October 1900

OTTAWA, October 7, 1930.

The Hon. G. D. ROBERTSON,
Minister of Labour,
Ottawa.

SIR,—I have the honour to transmit to you the report of Mr. T. N. Phelan, K.C., Commissioner appointed under the Combines Investigation Act to investigate the Electrical Estimators' Association, an alleged combine of electrical contractors in the city of Toronto.

Yours faithfully,

F. A. McGREGOR,
Registrar, Combines Investigation Act.

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REPORT OF COMMISSIONER

TORONTO, October 4, 1930.

F. A. MCGREGOR, Esq.,
Registrar, Combines Investigation Act,
Department of Labour,
Ottawa.

DEAR SIR,—By Order of May 21, 1930, of His Excellency the Governor General in Council, I was directed to investigate an alleged combine of electrical contractors in the city of Toronto, known as the Electrical Estimators' Association, and the business of the persons who were parties or privies thereto. In due course that investigation was conducted and my report and my findings and conclusions upon the evidence are submitted herewith.

I. THE INCEPTION AND METHODS OF THE ASSOCIATION

The Electrical Estimators' Association was not incorporated. Its members comprised a number of those whose business it was to carry on electrical installations in the Toronto area and membership in the association changed from time to time. It came into existence in the spring of 1927, and ceased to carry on its operations about October, 1929.

During this period the main, if not the only, activity of the association was the supervision and control of tenders. There were three methods of dealing by the association with tenders for proposed work. These methods were the subject of investigation by this commission, and may be described as (a) the averaging of tenders, (b) the averaging of costs, and (c) protected jobs.

In the averaging of tenders this practice was followed: Those members who proposed to tender on a job under consideration met at the association's office, bringing with them the tenders which they proposed to submit to the owner. The different tenders were tabulated and averaged, and the tender nearest to the average was then submitted by the member to the owner. Those whose tenders were above the average submitted them without change; those whose tenders were below increased the amount to bring their tender above that submitted by the member selected by the association.

After a time the method was changed from the averaging of tenders to the averaging of costs. By this method the members of the association who proposed to tender on a job met. Each of those at the meeting submitted his estimate of the cost of labour and material for the work in contemplation. These estimates were tabulated and averaged. According to the plan, if the highest estimate was more than 10 per cent above the next highest, or the lowest more than 10 per cent below the next lowest, these were eliminated before averaging. The member submitting the estimate nearest the average was entitled to submit a tender for the contemplated work without fear of price competition from the other members of the association. To his estimate of costs the successful member was entitled to add an over-riding charge covering overhead and profit, and in an analysis of the different works done on this method the over-riding per cent varied from 20 per cent to 30 per cent, the average being about $27\frac{1}{2}$ per cent.

Under the third practice of the association above referred to, "protected jobs", a member who could establish to the satisfaction of the association a relationship with the owner of the proposed work which gave him some assurance that the contract would be awarded to him was given the privilege of submitting a tender free from any price competition whatever on the part of the other members of the association. The "protected" member advised the others in the association of his tender price. It was for the others then either to refrain from quoting or to quote a figure higher than that of the "protected" member.

When a member was successful in securing a contract after it had been allotted to him by the association by any of the above methods, he then paid to the association 2 per cent of the contract price. This percentage was usually added to the tender and passed on to the owner. The association received approximately \$5,300 from this source.

The result of these methods to the owner or to the public, and the effect in lessening competition, may be illustrated by reference to some of the jobs which came under investigation. All the jobs with which the association dealt are listed and numbered at pages 44 to 47 of the evidence; the list is repeated in an appendix to this report. Not all of these jobs were averaged by the association, but in each case there is evidence either that the job was discussed at a meeting or that a meeting was called for that purpose.

II. EXAMPLES OF THE AVERAGING OF TENDERS

JOB NO. 2—WEST END TECHNICAL SCHOOL (APRIL, 1927)

Five members of the association submitted tenders for the purpose of averaging. No evidence is available as to the exact amount of the tenders which were considered by the association in this case because, by a strange coincidence, the association's record books showing the amounts of tenders and costs and how they were dealt with disappeared shortly before the preliminary investigation in October, 1929. The fact remains that the tender was allotted to E. L. Roxborough by the association at \$58,000, and all the other members of the association, to preserve an appearance of competition, did, in compliance with the practice of the association, tender at an amount in excess of the Roxborough tender. Even if the original figures are not available, the fact that the Roxborough tender was the average leads to the definite conclusion that others in the association had submitted, for the purpose of averaging, figures lower than the Roxborough tender, and were prepared to submit the same figures to the owner, which in this case was the Board of Education. The result to the owner was the loss of competitive tenders and of the opportunity of considering and dealing with tenders lower than that submitted by Roxborough.

JOB NO. 3—THE SICK CHILDREN'S HOSPITAL (APRIL, 1927)

The same method was followed by the association in dealing with this proposed work. The original tenders as submitted to the association in this case were recorded in the working sheets of one of the members of the association, and in that way became available to the commission. The amounts of the tenders considered by the association were as follows: Bennett & Wright, \$8,351; Canada Electric, \$9,621; Harris & Marson, \$9,595; Richardson & Cross, \$8,000; Roxborough, \$7,000.

The contract was awarded to Bennett & Wright at \$8,351. The two members of the association who were below Bennett & Wright (Richardson & Cross at \$8,000 and Roxborough at \$7,000) conformed with the practice of the association by submitting tenders in excess of \$8,351—their tenders being respectively \$8,800 and \$8,925. The owner was thereby deprived of the benefit of considering and dealing with these lower tenders.

JOB No. 6—TORONTO EAST GENERAL HOSPITAL (AUGUST, 1927)

This contract was allotted by the association to Electrical Maintenance and Repairs Company, Limited, at \$16,328. The amounts which the other members of the association submitted as tenders to the association for the purpose of averaging were not available; but it must be assumed that some of these tenders were below the tender of Electrical Maintenance, and again the owner was deprived of the benefit of considering and dealing with those giving lower tenders, because the members of the association who tendered submitted to the owner tenders in excess of that submitted by Electrical Maintenance. The evidence does disclose that Roxborough submitted for averaging a tender of approximately \$13,602. His tender submitted to the owner after averaging was \$16,950.

JOB No. 7—TORONTO GENERAL HOSPITAL EXTENSION (AUGUST, 1927)

This contract was allotted by the association to Harris & Marson, members of the association, at \$11,106. They became the successful tenderers, and the conclusion must be drawn that other members of the association had been ready and willing to tender for a lesser amount. The records produced by Canada Electric Company, Limited, a member of the association, show their tender, as submitted to the association, to have been \$10,428. After being eliminated by the averaging they then submitted no tender to the owner.

III. EXAMPLES OF THE AVERAGING OF COSTS

JOB No. 9—ARENA GARDENS (NOVEMBER, 1927)

In this and the examples that follow the members of the association submitted for the purpose of averaging not tenders but estimated costs. This contract was allotted by the association to the Bayview Electric Company at \$1,115, which represents the average costs plus an over-riding charge for overhead and profit, which the evidence would indicate seldom exceeded 30 per cent. The other members of the association then tendered at a figure in excess of the tender submitted by the Bayview Electric Company. In this instance the estimated costs of R. A. L. Gray and Company, one of the members of the association, are available. His estimated costs were \$601. Thus under conditions of ordinary competition a figure for overhead and profit not exceeding 30 per cent would have been added; but, conforming with the practice of the association, Gray submitted a tender of \$1,140, which meant an increase for overhead and profit of 90 per cent. His tender under ordinary competition would not have exceeded \$800, and the owner was deprived of the benefit of Gray's and other competitive tenders by reason of the practice of the association.

JOB No. 16—MURRAY P. FLEMING RESIDENCE (JANUARY, 1928)

This contract was allotted by the association to Gray at \$4,722. In accordance with the practice of the association, the other members submitted to the owner tenders in excess of this figure. The owner, however, elected not to accept the tender of Gray, the lowest tender, but to award the contract to Alexander, another member of the association, at \$4,880. The fact is that Alexander, had he been free to do so, would have submitted a tender to the owner at not more than, and probably less than, \$3,764. This amount would have included 33½ per cent for overhead and profit. In any event, the owner paid in this particular case, to a member of the association, \$1,116 more than he would have paid if the tenderer had not been a member of the association. Dealing with this contract, the evidence of Mr. Rohleder, Manager of Harry Alexander, Limited, at p. 1135, is illuminating:—

Q. The first object of the association was to get higher prices for your work?

A. Yes, and to educate one another to estimate properly.

Q. By reason of your membership you were able to get more than one thousand dollars more on your tender (on the Fleming job), and still get the contract?

A. Yes.

Q. Does this instance we are discussing fairly well represent the operation of the association in its result to the public; is this typical?

A. Yes.

JOB NO. 19—ERSKINE CHURCH (JANUARY, 1928)

The Moss Electric Company, having submitted to the association an estimate of costs nearest the average, was allotted the contract. This member's estimated costs were \$2,675, to which was added for overhead and profit 22 per cent, and a tender of \$3,264 was submitted to the owner. Two members of the association, Alexander and Patterson, had submitted to the association lower estimates of costs. Adding the same per cent for overhead and profit to Patterson's estimate of costs, he would have tendered at \$2,375, when, in fact, conforming to the practice of the association, he tendered at \$3,475. Adding the same per cent for overhead and profit to the Alexander estimate, he would have tendered at \$2,630, when, in fact, this firm tendered at \$3,458. These additions represent in the case of the tender of Patterson a spread of 77.7 per cent of the cost, and in the case of the Alexander tender a spread of 60 per cent of the cost, and they illustrate the extent to which the owner was deprived of the benefit and advantage of competitive tenders.

IV. EXAMPLES OF PROTECTED JOBS

JOB NO. 14—CLARIDGE APARTMENTS (JANUARY, 1928)

The Bayview Electric Company claimed protection on this job and submitted to the owner a tender first of \$11,720 and later of \$11,000. The association was informed of the amount of this tender and four other members of the association submitted tenders to the owner in excess of that, viz.: Bennett & Wright, \$12,320; Canada Electric Company, \$12,000; J. E. Curran and Company, \$12,122; and Richardson & Cross, \$12,090. The extent of the disadvantage to the owner cannot be estimated, because there is not and never was in existence any data to indicate actual costs to the tenderers other than the Bayview Electric Company. The other members made no actual estimate. The figures which they submitted were entirely fictitious and were any sums in excess of the protected tender.

A similar practice was adopted in connection with Job No. 21—Ontario Silk Knit, Limited (February, 1928); Job No. 24—Sterling Towers (March, 1928); Job No. 30—National Trust Company (July, 1927); Job No. 39—Exide Battery Building (January, 1929); Job No. 44—York Collegiate Institute (February, 1929) and others. In the Exide Battery case the Toronto Electric Company paid to the association a 3 per cent commission on the tender price. This firm added to their estimate of costs 30 per cent plus 3 per cent and paid the 3 per cent to the association. This is the only occasion which came under observation where more than 2 per cent was paid, and no explanation was forthcoming for the additional 1 per cent. It might not be unfair to the association to infer that the protection in this particular case was worth more to the successful tenderer than the normal rate of 2 per cent, and that the additional 1 per cent was an expression of gratitude therefor.

It is not proposed to deal with the remainder of some sixty jobs which came within the scope of the association's activities.

V. OBSERVATIONS ON METHODS OF ASSOCIATION

During this period the members of the association were in substantial control of all the larger contracts for installation in the Toronto area. The fact was admitted that, although the membership in the association included fewer than twenty contractors, these contractors had virtually a monopoly of the larger jobs in the city. The following is an extract from the evidence of H. Rohleder of Harry Alexander, Limited (p. 290):—

Q. And you eventually did include in your membership all of the contractors in the electrical trade in Toronto who were capable of handling big construction jobs?

A. Yes.

Mr. J. A. McKay, secretary of the association, gave evidence to the same effect (p. 5):—

Q. What would you say to this suggestion, that the members of the Electrical Estimators' Association include practically the whole of the electrical contractors in the city who are in a position to handle what we might call a big job?

A. That might be a fair statement, sir.

Having regard to the dominant position of the association and the examples referred to, the results to the owners and the public are fairly obvious.

Reference should be made to the secrecy with which the methods of the association were conducted. The secretary and other members of the association admitted that these methods were carefully concealed from the owners and architects with whom the members were dealing. Prominent architects were called who testified that they had no knowledge or suspicion of these practices. Indeed, it is obvious that the practice could not be successfully maintained unless it was kept absolutely secret.

It was faintly contended that the association came into existence and was maintained for the purpose of educating its members in preparing accurate cost estimates. The evidence does not warrant the conclusion that any attention was given to the education of the members along these lines. The result of the method was rather to encourage carelessness in the preparation of tenders, because the successful member was the one who could most accurately guess the average figures which might be submitted to the association.

VI. CONCLUSIONS

Upon the above facts the inquiry arises: Is there a combine which is obnoxious to common law, or to the Criminal Code, or to the Combines Investigation Act?

At common law a wide protection was given to the right of contract, and it may be that the activities of this association did not offend any of the principles of common law.

Under the Criminal Code, section 498 makes it an indictable offence to conspire, agree, or arrange with any other person to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale or supply of any article or commodity which may be the subject of trade or commerce. As I understand the argument of counsel representing the members of the association, it was conceded that the practice observed by the members of the association did result in the lessening of competition, but he contended that such lessening of competition was not in respect of an article or commodity which may be the subject of trade or commerce, and that the action of the association did not result in "unduly" lessening competition or "unreasonably" enhancing the price of any article or commodity. With these contentions I do not agree.

Competition was interfered with, both in respect of the article or commodity with which the members of the association dealt, and in respect of the labour for the installation of these articles or commodities. An analysis of the figures of different tenders showed that material was a very much larger part of the tender than labour. I find also that competition was unduly prevented or lessened and that the prices of the articles or commodity which the members of the association dealt with were unreasonably enhanced. There was, therefore, a violation of the provisions of the Criminal Code by the members of the association concerned in these unlawful acts.

Finally, was there a combine contrary to the provisions of the Combines Investigation Act? This Act is directed against combines which have operated or are likely to operate against the interest of the public and which result from any agreement having, or designed to have, *inter alia*, the effect of lessening competition or enhancing prices.

Counsel for the members of the association contended that the Combines Investigation Act is *ultra vires*. Since the validity of the Act is now under consideration before the Privy Council it would not be of advantage here to make any comment on this objection.

The main contention of counsel for members of the association was that there was no evidence that the practice of the association was detrimental to the public interest. He supported this contention by the argument, first, that the individual or the public was not entitled to the benefit of free competition, and the fact that an owner was obliged to pay a higher price for work or commodity was not a matter against the public interest; and, secondly, that the possible elimination of a lower tender was not an offence against the public interest, provided the owner received good work at a reasonable price.

It is my view that the public is entitled to the benefit of free competition. In any event, the public is entitled not to have imposed upon it a system having the appearance of free competition when, in fact, it is not. There is no doubt that individual owners have been obliged to pay a higher price by reason of the operation of the association. Unquestionably that is against the interest of the public. As to the contention of counsel that the eliminating of a possible lower tender was not against the public interest if it was shown that the owner had received good work at a reasonable price, the evidence discloses that, by reason of the operations of the association, owners were called upon to pay a price which was unduly enhanced and unreasonable.

It is therefore my conclusion that the activities of the association did operate against the interest of the public and that these activities resulted from an agreement which had, or was designed to have, the effect of lessening competition or enhancing price, and constituted a combine contrary to the provisions of the Combines Investigation Act.

Under section 32 of this Act every person is guilty of an indictable offence "who is a party or privy to or knowingly assists in the formation or operation of a combine within the meaning of this Act". I find upon the evidence and so report that the following were members of the Electrical Estimators' Association (J. E. Curran died in 1929):—

Harry Alexander, Limited
 Bayview Electric Company, Limited
 Beattie-McIntyre, Limited
 Bennett and Wright Company, Limited
 Canadian Comstock Company, Limited
 Canada Electric Company, Limited
 A. O. Duncan
 Electrical Maintenance and Repairs Company, Limited

R. A. L. Gray and Company
Harris and Marson
Moss Electric Company
J. Everard Myers
Patterson Electric Company
Richardson and Cross
E. L. Roxborough
Toronto Electric Company
John Anderson McKay, Secretary
James E. Curran and Company

and that these members did enter into a combine which was contrary to the provisions of the Combines Investigation Act; and that by section 32 of the Act they committed indictable offences. I am also of the opinion that the same members have violated section 498 of the Criminal Code.

All of which is respectfully submitted,

(Signed) THOMAS N. PHELAN,
Commissioner.

APPENDIX TO REPORT OF COMMISSIONER

LIST OF JOBS DEALT WITH BY

THE ELECTRICAL ESTIMATORS' ASSOCIATION

<i>Job No.</i>	<i>Name of Job</i>	<i>Date</i>
1	Coliseum Building (Exhibition Grounds)	March, 1927
2	West End Technical School	April, 1927
3	Sick Children's Hospital	April, 1927
4	Allenby School	August, 1927
4½	Parkdale Collegiate	June, 1927
5	Link Belt, Limited, Building	June, 1927
5½	Loblaw Warehouse	August, 1927
6	Toronto East General Hospital	August, 1927
6½	Jockey Club, Grand Stand	August, 1927
7	Extension of General Hospital	August, 1927
8	Giles, Rice and Peters Building	July, 1927
8½	British American Oil Company Refineries	October, 1927
9	Arena Gardens—Additions	November, 1927
10	Farmers' Dairy Distribution Plant	November, 1927
11	Sigmund Samuel Residence	December, 1927
12	Toronto Motor Car Company Building	December, 1927
13	Toronto "Star" Building	December, 1927
14	Claridge Apartments	January, 1928
15	Bond Street United Church	January, 1928
16	Murray P. Fleming Residence	January, 1928
17	A. D. Gorrie Company Garage	January, 1928
18	John Northway and Company Building	January, 1928
18½	Woodbine	January, 1928
19	Erskine Church	February, 1928
20	Imperial Bank, Yonge and Bloor Streets	February, 1928
21	Ontario Silk Knit Building	February, 1928
22	Canadian Bank of Commerce (Bay and Wellington Branch)	February, 1928
23	Bank of Nova Scotia, Stationery Building	February, 1928
24	Sterling Towers	March, 1928
25	McConkey's Cafe	March, 1928
25½	Bell Telephone Building	June, 1927
25¾	Electrical Building (Exhibition Grounds)	March, 1928
26	Eglinton and Bedford Park Church	March, 1928
27	Crown Cork and Seal Building	March, 1928
28	Lake Simcoe Ice Building	March, 1928
29	St. Michael's and All Angels' Sunday School	April, 1928
30	National Trust Building	July, 1927
30½	Balmoral Apartments	May, 1928
31	Toronto General Trusts	May, 1928
32	St. Paul's Parish Hall	May, 1928
33	Toronto General Hospital	June, 1928
34	Royal Concourse Building	May, 1928
34½	Traymore Restaurant	July, 1928
35	Medical Arts Building	September, 1928
36	Toronto Public Reference Library	October, 1928
37	Firstbrook Boxes Factory	December, 1928
38	Canada Pad and Paper Factory	December, 1928
38½	Maurice Cody School	April, 1928
39	Exide Battery Building	January, 1929
40	Miller Lithographic Building	January, 1929
41	Standard Radio Building	January, 1929
42	S. S. Kresge Store, Yonge and Roselawn	February, 1929
43	S. S. Kresge Store, Danforth Avenue	February, 1929
44	York Collegiate Institute	February, 1929
45	St. Joseph's Hospital	March, 1929
46	Automotive Building (Exhibition Grounds)	March, 1929
47	Prest-O-Lite Storage Battery Building	May, 1929
48	Solloway Mills Building	July, 1929
49	A. & P. Warehouse	July, 1929
50	Firestone Tire Building	August, 1929
51	Toronto Iron Works	August, 1929
52	Provincial Paper Company Building	March, 1929
53	Victory Building	June, 1929

